

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-1006

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

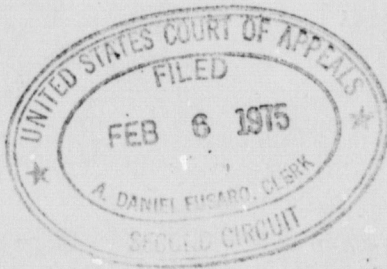
WILLIE L. ROLAND,

Appellant.

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PA
Docket No. 75-1006

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTION PRESENTED

Whether the instructions given by the Court on "absolute certainty" and the function of the jury, both of which were objected to by counsel, were erroneous and require reversal.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Lloyd F. MacMahon) entered on December 17, 1974, after a trial before a jury, convicting appellant Willie L. Roland of the second of a two-count indictment* charging distribution and possession with intent to distribute heroin (21 U.S.C. §§812, 241(a)(1), (b)), and sentencing him to three years' imprisonment and a three-year term of special parole

The District Court granted leave to appeal in forma pauperis, and this Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant was indicted for distribution or possession with intent to distribute heroin on March 26, 1974, and June 14, 1974.

The Government's case was presented through the testimony of undercover agent Ralph Nieves. Nieves was introduced to

*Appellant was found not guilty on count one of the indictment. The indictment is annexed as "B" to appellant's separate appendix.

appellant on March 26, 1974, by an informer (14*). The three got into Nieves's car and, after making several stops, appellant went into a bar. On his return to the car, appellant said they would have to wait for the drugs at his apartment (16).

They returned to the apartment and shortly thereafter a black male arrived. With that man, appellant went into the bedroom. Then appellant left the apartment and returned with a package which he gave to Nieves. Nieves weighed the package and paid appellant \$1,500 (16).

During the next several months Nieves spoke to appellant about fifteen times, and late in April appellant gave Nieves his telephone number (23). This number turned out to be incorrect, and appellant later gave Nieves a different number (29).

According to Nieves, a second transaction was to take place on April 29, 1974, but was unsuccessful because of appellant's inability to meet his contact (29-34).

On June 14, 1974, pursuant to arrangements they had made the previous day, Nieves met appellant at appellant's apartment and there purchased heroin for \$1,800 (36.)**

*Numerals in parentheses are references to pages of the trial transcript.

**According to Nieves, appellant told him that this heroin came from a different contact (35) and was better quality (36).

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It was stipulated that the powder given by appellant contained heroin (105-106).

Appellant testified on his own behalf that he met Nieves through David Coleman.** Nieves and Coleman wanted to sell appellant drugs (114) and to buy some as well (116). Appellant said he had no drugs (117). Nieves asked appellant if he knew of anyone who had drugs, and appellant said he recalled someone named George who said he had drugs (117). Appellant was to go to help find George, for which he would be paid a small fee (118). Appellant, Nieves, and Coleman went in Nieves's car in the search for George (119), but when, after several stops at bars which George frequented, the search was fruitless, they gave up (120). During these stops, appellant held \$1,500 for Nieves and Coleman, but returned it at the end of the trip (123).

Nieves often left messages for appellant (129). Later on, Nieves wanted to buy drugs to take to Puerto Rico (130), and appellant told Nieves that David could find George (130). Appellant gave no testimony concerning the June transaction.

The Judge then charged the jury.** As part of his instructions on the juror's function, the Judge stated:

*Coleman was a friend of appellant's who gave him drugs to sniff to help relieve the pain of a back injury appellant had suffered while at work (121).

**The complete charge is "C" to the separate appendix.

... Your most important function is to determine which witnesses you are going to believe, and this is so as to every witness, whether called by the Government or whether called by the defendant.

(195-196).*

*The Judge also charged on burden of proof, reasonable doubt, and presumption of innocence:

"Now the defendant here has denied the charges made against him, both by his plea of not guilty and by his testimony upon the stand. The defendant has no burden of proof to sustain in this case. He is under no obligation to produce any witnesses. He is presumed to be innocent and this presumption of innocence continues throughout the trial, and during your deliberations. The presumption of innocence is overcome when, and only when, the Government establishes the guilt of the defendant beyond a reasonable doubt..

"Now what do I mean by a reasonable doubt? As the phrase implies, a reasonable doubt is a doubt that is based upon reason, a reason which appears in the evidence or in the lack of evidence. It is not some vague, speculative, imaginary doubt, nor a doubt based upon what one of you might regard as an unpleasant duty.

"The Government is not required to prove the defendant's guilt beyond every possible doubt, nor to an absolute or mathematical certainty, because such measure of proof is usually impossible in human affairs.

"You should review all of the evidence as you remember it, sift out what you believe, weigh it in the scale of your reasoning powers, and discuss it with your fellow jurors. If that process produces a solemn belief or conviction in your mind, such as you would be willing to act upon without hesitation if this were an important matter of your own, then you may say you have been convinced beyond a reasonable doubt.

"On the other hand, if your mind is wavering, or so uncertain that you would hesitate to act if this were an important matter of your own, then you have not been convinced beyond a reasonable doubt and you must render a verdict of not guilty." (198-199).

At the conclusion of the charge, defense counsel objected to this instruction:

Your Honor also said that [the jurors'] most important function is to decide which witnesses they were to believe. In a criminal case it is my judgment that they can well disbelieve the defendant entirely and yet still have a reasonable doubt based strictly on the Government's evidence. It is not a balancing of beliefs in a criminal case.

(206-207).

The Judge declined to correct his charge.

The jury began deliberations at 10:11 a.m. (207), and continued to 4:10 p.m. (211).^{*} At 4:10 p.m., they reported they could not reach a verdict (211). The Judge instructed them:

... What you do is go back and try again. It is only natural sometimes to resent the opinions of those who disagree with us. Sometimes after long discussion hostilities spring up that close our minds to other people's advice. In a large portion of cases absolute certainty cannot be expected. That is why we have the jury system. That is why we put it in the hands of twelve people drawn from the community, twelve people who don't know anything about the case who are equally qualified, intelligent, to serve as jurors. Your verdict, of course, must be the verdict of each individual juror and not a mere acquiescence in the conclusion of your fellows.

(211-212).

^{*}During this time they returned with a question (209) and went to lunch (211).

Counsel objected to this charge:

Your Honor, we except to an Allen charge some five hours only after deliberations have been started. In addition, the manner in which the Court stated its instruction just now suggested that conviction would be very appropriate in this case because the exact words were that absolute certainty cannot be expected, which suggests that the Court is suggesting a conviction because --

THE COURT: You are frivolous. I note your exception.

(213).

After further deliberations from 4:15 to 8:45 p.m. (215),* with requests for evidence, the jury returned with a verdict of not guilty on Count One and guilty on Count Two.

*This includes an hour-and-a-half for dinner and reading of evidence.

ARGUMENT

THE INSTRUCTIONS GIVEN BY THE COURT ON "ABSOLUTE CERTAINTY" AND THE FUNCTION OF THE JURY, BOTH OF WHICH WERE OBJECTED TO BY COUNSEL, WERE ERRONEOUS AND REQUIRE REVERSAL.

A. The Charge on the Jury's Responsibility

In his charge to the jurors* explaining their responsibilities, the District Judge stated:

Your most important function is to determine which witnesses you are going to believe, and this is so as to every witness, whether called by the Government or whether called by the defendant.

(196).

At the conclusion of the charge, defense counsel objected to this portion, stating:

Your Honor also said that [the jurors'] most important function is to decide which witnesses they were to believe. In a criminal case it is my judgment that they can well disbelieve the defendant entirely and yet still have a reasonable doubt based strictly on the Government's evidence. It is not a balancing of beliefs in a criminal case.

(206-207).

The Judge, noting the exception, made no modification in his instruction.

*The entire charge is annexed as "C" to appellant's separate appendix.

Defense counsel was correct in his objection to the instruction. It is clear that the accused has no specific burden with respect to a defense. All that need be done by the defense is to create a reasonable doubt in the Government's case. See United States v. Booz, 451 F.2d 719 (3d Cir. 1971), cert. denied, 414 U.S. 820 (1972); United States v. Houston, 434 F.2d 613 (5th Cir. 1970); United States v. Marcus, 166 F.2d 497, 503-504 (3d Cir. 1948). By telling the jurors that they had to decide whom to believe, the Judge contravened the presumption of innocence. Indeed, this exact charge, given where the defendant had presented an alibi, was held to be reversible error. United States v. Beedle, 463 F.2d 721 (3d Cir. 1972); United States v. Barrasso, 267 F.2d 908 (3d Cir. 1959). See also Stump v. Bennett, 398 F.2d 111 (8th Cir.), cert. denied, 393 U.S. 1001 (1968) (holding it constitutional error to place the burden of proof on the defendant).

It was the Judge's responsibility to explain to the jury that the presentation of evidence by the defense did not shift the burden of proof, Bird v. United States, 180 U.S. 356 (1901), and that a judgment of acquittal was not dependent upon believing the defense witness, in this case the defendant himself. However, the only other statement made by the Court relevant to this subject was that

... [t]he defendant has no burden of proof to sustain in this case. He is under no obligation to produce any witness.

(198).

At best, this charge contradicts the earlier charge counsel objected to. In the earlier instruction, the Judge had specifically told the jurors that they had to believe the defense witness over the Government's witnesses. This is hardly consistent with the later statement that the defense has no burden of proof, and this conflict is error. United States v. Clark, 475 F.2d 240, 248 (2d Cir. 1973); United States v. Squires, 440 F.2d 859, 867 (2d Cir. 1971).

The second sentence of the portion of the charge quoted above does not instruct the jurors as to the effect of the choice by the defendant to produce witnesses. In fact, if the two sentences are read together with the objected to portion, the jury was told, in essence, that while the defendant has no evidentiary obligation or burden of proof, if he does introduce some evidence, the standard then changes. This is plainly error.

It is clear that the erroneous charge was not cured by a general charge on burden of proof or presumption of innocence, because the two are at best inconsistent, or if reconcilable, are so only to the reduction of the Government's burden of proof where a defense is presented. United States v. Barrasso, *supra*; United States v. Booz, *supra*. Counsel's objection was well and timely taken, and the error requires reversal.

B. The modified Allen charge was erroneous.

After five hours of deliberation,* the jury returned a note indicating that a verdict could not be reached. The Judge responded by saying:

... What you do is go back and try again. It is only natural sometimes to resent the opinions of those who disagree with us. Sometimes after long discussion hostilities spring up that close our minds to other people's advice. In a large portion of cases absolute certainty cannot be expected. That is why we have the jury system. That is why we put it in the hands of twelve people drawn from the community, twelve people who don't know anything about the case who are equally qualified, intelligent, to serve as jurors. Your verdict, of course, must be the verdict of each individual juror and not a mere acquiescence in the conclusion of your fellows.

(211-212).**

*This excludes an hour for lunch.

**The Judge continued: "Yet you should examine the questions submitted to you with candor and with a proper regard in deference to the opinions of each other. It is your duty to decide the case if you can do so conscientiously. You should listen to each other's arguments with a disposition to be convinced as I told you in the instructions proper. Talk out your differences. If much the larger number of you is for conviction, a dissenting juror should consider whether his doubt is a reasonable one when it makes no impression upon the mind of so many others who are equally honest and equally intelligent. If, on the other hand, the majority is for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority." (212).

Counsel objected to this charge:

[DEFENSE COUNSEL]: Your Honor, we except to an Allen charge some five hours only after deliberations have started. In addition, the manner in which the Court stated its instruction just now suggested that conviction would be very appropriate in this case because the exact words were that absolute certainty cannot be expected, which suggests that the Court is suggesting a conviction because --

THE COURT: You are frivolous. I note your exception.

(213).

Telling the jurors in an Allen charge that they need not find guilt to an absolute certainty in order to convict, without a further contemporaneous explanation of the standard of proof required was error.

It is clear that appellant was entitled to an acquittal unless his guilt was established with the "utmost certainty:"

... It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with utmost certainty.

In re Winship, 395 U.S.
358, 264 (1969).

Moreover, it has become axiomatic that proof "beyond a reasonable doubt" and proof "to a moral certainty"* are synonymous

*"A reasonable doubt exists whenever, after careful and impartial consideration of all the evidence in the case, the jurors do not feel convinced to a moral certainty that a defendant is guilty of the charge." Devitt & Blackmar, FEDERAL JURY PRACTICE AND INSTRUCTIONS, §11.01 (2d ed. 1970).

and equivalent terms. Hopt v. Utah, 120 U.S. 430, 440 (1887); United States v. Franzese, 392 F.2d 954, 964-965 (2d Cir. 1968), vacated on other grounds sub nom. Giordeno v. United States, 394 U.S. 310 (1969); United States v. Aiken, 373 F.2d 294, 299 (2d Cir. 1967); see also Leland v. Oregon, 343 U.S. 790, 795 n.8 (1951); Wilson v. United States, 232 U.S. 563, 569-570 (1913).

In Miles v. United States, 103 U.S. 304 (1881), the Supreme Court concluded that an instruction requiring "an abiding conviction ... to a moral certainty" accurately reflected the degree of proof necessary to justify conviction. The instruction, inter alia, stated:

Proof beyond a reasonable doubt is such as will produce an abiding conviction in the mind to a moral certainty that the fact exists that is claimed to exist, so that you feel certain that it exists.

Id., 103 U.S. at 309.

In United States v. Byrd, 352 F.2d 570 (2d Cir. 1965), the district court instructed the jury that a reasonable doubt is a "doubt to a moral certainty." Reversing the conviction, this Court held that

"[d]oubt" and "certainty" are antithetical and in our opinion, the use of them in this manner and for this purpose would tend to create more confusion than light in the minds of the jury.

Id., 352 F.2d at 575.

Since "utmost certainty" is inherent in proof beyond a reasonable doubt, instructing the jury that "absolute cer-

tainty" was not necessary was error. As a threshold issue it makes no sense to draw a distinction between "utmost" and "absolute" certainty. The two standards are virtually indistinguishable, and even if they are different in degree, it is impossible that the difference can be articulated in a manner which could be conveyed to the jury.

What is more, however, is that in this case the Judge made no attempt to put "absolute certainty" into the context of reasonable doubt, or to explain the point at which reasonable doubt ends and "absolute certainty" begins. Since for practical purposes the two are very close, the effect of the District Court's instruction was to leave the jurors without a method of evaluating the standard of proof required and to permit the jurors to convict on less than moral certainty -- proof beyond a reasonable doubt.

It simply was not necessary to charge in these terms, and the instruction should not have been given. The prejudicial impact of the charge was increased because it was in the Allen charge. As such, it was obviously the last instruction given to the jurors and came in the midst of their deliberations.

CONCLUSION

For the foregoing reasons, the judgment of conviction should be reversed and the case remanded to the District Court for a new trial.

Respectfully submitted,

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Certificate of Service

February 6, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Phyllis Sheroff Benberger